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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of<br><br>Implementation of the<br>Local Competition Provisions in<br>The Telecommunications Act of 1996 | ) | CC Docket No. 96-98 |

REPLY COMMENTS OF
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

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# TABLE OF CONTENTS

## TABLE OF CONTENTS
**(Continued)**

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| | | |
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# REPLY COMMENTS OF NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

Pursuant to the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure, 47 C.F.R. §§ 1.49, 1.415, and 1.419 (1995), the National Association of Regulatory Utility Commissioners ("NARUC") files this reply to initial comments filed in response to the "Notice of Proposed Rulemaking" ("*NPRM*") adopted in the above captioned proceeding April 19, 1996 [FCC 96-182].

## I. INTRODUCTION

As stated in our initial comments, NARUC believes that Federal-State cooperation is essential to ensure that federal and State policies work in concert to bring the benefits of competition to all markets and subscribers. We believe there are several critical issues raised by the NPRM that must be the focus of additional Federal-State discussions. In the interim, the States will continue to move forward to implement pro-competitive goals of the Act. Continued discussions on issues of mutual concern will facilitate these efforts.

Over 160 parties filed in response to the FCC's request for comments. A number of themes developed. Common to most proposals, including NARUC's, was the notion that, at least with respect to some limited issues raised by § 251, the FCC should establish general guidelines which permit States significant flexibility to take additional action.

Various commenters took a position regarding the FCC's authority to promulgate prescriptive guidelines that effectively reads 47 U.S.C § 152(b) out of the statute. The State Commissions took a more balanced view. Specifically, these agencies pointed out that the Act clearly defines roles for both Federal and State regulators and that those roles are explicitly based on the fundamental division of authority enunciated in § 152(b).

Finally, numerous commenters submitted significant documentation, almost all varying in approach or significant details or both, in support of their candidates for national pricing guidelines. Most understandably eschewed any substantive discussion of the source of the FCC's putative authority to promulgate such guidelines.

As discussed below, NARUC contends the 1996 Act's new framework reflects Congress' decision to leave direct oversight of intrastate markets, particularly with regard to pricing issues, to the States as the most expedient way to both assure the development of genuine local exchange competition and ensure consumers are protected. Indeed, even if one concedes, arguendo, that the FCC has the requisite authority, the diversity in approach and/or significant details found in the various commenters' proposals and the various pro-competitive policies already being implemented by the States, suggests, at a minimum, that promulgation of any such pricing guideline is, at best, premature.

## II. DISCUSSION

### A. The Act clearly defines roles for both Federal and State regulators, particularly with regard to pricing, and those roles are explicitly based on the fundamental division of authority enunciated in § 152(b).

#### 1 - The FCC's authority to promulgate, inter alia, pricing rules under § 251 must be construed in tandem with § 152(b).

In its initial comments, NARUC contended that examination of the history and text of the 1996 Act clearly indicates Congress' intent that

- o the FCC take a very flexible and general approach to any implementing rules, and, that -
- o §§ 251, 252, and 253, should be read in concert with § 152(b).

NARUC recognizes that the FCC has the authority and duty to impose minimum general guidelines under certain sections of the Act.[1] However, our comments make clear that the rules promulgated by the Commission under § 251 must comply with § 152(b).

Indeed, the application of § 152(b) to § 251 and 252 is a prerequisite to any clear reading of the Act. Such application is particularly relevant to any critical analysis of the FCC's proffered justification for promulgating pricing guidelines.

Most of the CLEC initial comments assigned the FCC extremely broad and prescriptive authority under the Act. Virtually all, like AT&T, agree with the FCC's suggestion that "the provisions of section 2(b) of the Act have no relevance to the Commission's authority to promulgate the rules that would best implement the Act's local competition provisions."[2]

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1 See, NARUC's Initial Comments at 14, 29-31.

2 See, AT&T comments at 6; Cf; MCI comments at 6-7; Sprint comments at 7, ALTS comments at 6-10.

Again, of the comments NARUC was able to review, none significantly augmented their broad generic arguments to specifically buttress the FCC's two and half page exegesis of its authority to establish pricing rules.

The CLECs rely primarily upon one basic point AT&T's comments are typical. It suggests "the explicit provisions of the subsequently enacted Section 251 would impliedly repeal the provisions of Section 2(b) even if they could otherwise be found applicable." Id. See also, e.g., MCI Initial Comments at 6-7.

However, the express limitations of 152(b) must take precedence over any contrary implications that might in theory be derived from § 251. As the Supreme Court held in comparable circumstances, 152(b) "constitutes...a congressional denial of power to the FCC to require State[s] to follow FCC...practices for intrastate ratemaking purposes." Louisiana Public Service Commission v. FCC, 476 U.S. 355, 374 (1986).

Just as the CLECs assert that the specific provisions of § 251 override § 152(b), the FCC argued in Louisiana that § 220 "deals specifically and expressly with depreciation" and should therefore override the general jurisdictional restriction imposed by 152(b). Id. at 376. The Court's response to the FCC argument is instructive According to the Louisiana court, the canon of statutory construction that "[s]pecific terms prevail over the general" does not apply when dealing with § 152(b). 476 U.S. at 376, n.5. In rejecting the FCC's contentions, the Court found that § 152(b) is a jurisdictional provision that governs the reading of other substantive provisions of the Act.[3]

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[3] The Court stated that § 152(b), which deals with jurisdiction, and § 220, which deals with depreciation, address "different subject[s]" and therefore "are not general or specific with respect to each other." Id.

Specifically, the Court determined that "by stating that nothing in the Act shall be construed to extend FCC jurisdiction to intrastate service, [§ 152(b)] provides its own rule of statutory construction" and "presents its own specific instructions regarding the correct approach to the statute which applies to how we should read " other substantive sections.[4] This same "rule of statutory construction" forecloses the similar CLEC argument here.

Again, as discussed in more detail in our initial comments, given the application of § 152(b), other express reservations of State authority, § 601's express proscription of implying changes in existing law, and generic rules of statutory construction, the FCC's stretch of the statutory language to propose prescriptive pricing rules cannot be supported.

**2 - Even if one assumes, <u>arguendo</u>, § 152(b) does not apply, the basic structure and history of § 251-2 indicates Congress' intent that the States, not the FCC, address pricing issues.**

Even if one concedes, <u>arguendo</u>, that § 152(b) does not apply, the basic structure of § 251 and § 252, taken in context, cannot be read to allow, let alone require, the Commission to establish pricing principles for the States to apply in carrying out the States' responsibilities in arbitrating agreements. As we noted in our original comments, the standards for pricing in these areas are located in § 252 and require the States, not the FCC, to implement them. Express references to States in §§ 251 and 252 and in the Joint Explanatory Statement, together with the references in § 252 to provisions of § 251, compel the conclusion that the FCC lacks authority to promulgate pricing guidelines binding on the States.[5]

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4 <u>Id</u>. In <u>Louisiana</u>, the Court specified § 220 in the cited quotation as it, like § 251 in this proceeding, was the purported source of FCC authority to override the mandates of § 152(b).

5 See, NARUC's Initial Comments at 16-20

Moreover, legal arguments aside, it does not appear that promulgation of national pricing rules is appropriate from a policy perspective.

**B. Imposition of a uniform national pricing rule is inappropriate from a policy perspective.**

**1 - The record suggests that, at best, detailed Federal pricing rules are premature.**

Numerous commenters submitted industry-sponsored proposals, almost all varying in approach or significant details or both, in support of their candidates for national pricing guidelines. Among the pricing models suggested are the Hatfield Model and related TSLRIC proposals, the Benchmark Cost Model, the Efficient Component Pricing Rule, and the Direct Cost of Supply Model. At least one commenter pointed out flaws on each of these models.[6]

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[6] See, e.g., AT&T's suggestion that there is little to be gained by adopting an economic cost "surrogate" or "proxy". AT&T Comments at 51. Sprint's query whether it is practical, at this point to use a proxy model like the BCM to prescribe rates for unbundled rate elements. Sprint Comments at 54. ACSI's suggestion that the FCC set a standard based on national averaged TSLRIC proxy to be used by ILECs which prefer not to do TSLRIC cost studies. ACSI Comments at 55. MFS's promotion of the benchmark cost model as the best analog for developing prices independent of the incumbents's revenue requirement. MFS Comments at 52. See, also, TCI's suggestion that a uniform price per minute, including a proxy for average interconnection, is too high for traffic that does not impose capacity costs, and too low for most or all traffic that does impose capacity costs. TCI Comments at 38. AT&T's support for the Hatfield Model. AT&T Comments at 51. Cf. ALTS Comments at 38 and ACSI Comments at 55, endorsing a TSLRIC approach. MFS's suggestion that economists seldom agree even on the definition of LRIC, let alone the best methods to complete a study; the FCC should use simpler, less intrusive and less arbitrary techniques than LRIC studies to test whether incumbent rates are just and reasonable. MFS Comments at 54 & 57. Cable & Wireless, Inc. (1) supported rates set at LRIC and to avoid adding costs like a "plus factor", and (2) claimed the Efficient Component Pricing Rule allows ILECs to recover non-economic costs from competitors. C&W Comments at 32-7. CompTel asked the FCC to explore proxies or other mechanisms to facilitate establishment of nationwide interconnection and network elements rates that reflect TSLRIC via a Joint Board. CompTel Comments at 67-79. The FCC should use "some" version of TSLRIC and alternative pricing proposals are not consistent with the Act; proxy-based outer limits result in cost-based rates only by coincidence. Frontier Comments at 21-3.

Commenters also staked out varying positions on reciprocal compensation arrangements. As NARUC suggested in its initial comments, a model that works well in one situation may perform very poorly in another.

Despite the cacophony of conflicting models and details, virtually all of the CLEC commenters suggest the FCC must impose uniform pricing guidelines. However, even if one concedes, arguendo, that the FCC has the requisite authority, the diversity in approach and/or significant details found in the various commenters' proposals and the range of current pro-competitive policies already being implemented by the States suggest, at a minimum, that promulgation of any such pricing guideline is premature.

**2 - Imposition of a national standard will disrupt many existing State pro-competitive policies because of the variance in actual network costs, State regulatory baselines, demographics, and local consumer preferences.**

A one-size-fits-all approach to pricing is untenable and unwise. The CLEC arguments assume that national standards are essential to promoting local competition and, as a natural corollary, that such a standard can be imposed without impeding or reversing many existing State pro-competitive policies. This assumption is fundamentally flawed.

Industry rhetoric aside, the services and networks at issue here are clearly local, not regional or national. As ALTS noted, albeit in a different context, a pro-competitive experiment in Nevada or South Dakota cannot be intelligently compared with the experience of New York or Illinois. ALTS Initial Comments at 4. Each local market is different. The actual cost of constructing and operating facilities, the State policy overlay, demographics and geography all vary dramatically from State to State.

## Costs of the Networks

The costs of the networks, even if the technology and operating systems are assumed to be identical, will vary based upon many factors extrinsic to the regulatory process, e.g., local labor costs, land values, State and local taxes, transportation costs, local zoning/right-of-way regulation, network topology, maintenance and/or construction costs associated with harsh weather conditions, earthquakes, projected frequency of floods, hurricanes, tornadoes, and geography. Of course the technology actually deployed also impacts the costs of providing service. Per subscriber costs also vary significantly depending upon the population density and relative percentages of business customers.

For example, evidence presented in Maine Docket 92-130 by the Maine commission's expert witness shows that the long run incremental cost of a loop (link) varies by a factor of over three to one between an urban and a moderately rural exchange.[7] The costs are even higher in the remote portions of Maine's rural service areas.

Connecticut presents another example in its comments. That State's principal ILEC is undergoing an infrastructure modernization program that may significantly alter its network topology. It is not likely to resemble the network topologies in many of the other rural States.

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[7] In Portland, Dr. Gabel has determined that the LRIC is $73.78 a year for the link vs. the Rockwood LRIC of $232.12. Surrebuttal Testimony of Dr. David Gabel, Maine Docket 92-130, Exhibit 5 (filed July 6, 1993).

Explicit FCC reciprocal compensation rate guidelines may not sufficiently account for distinctions between and among widely differing networks.[8] Additionally, uniform national rules may not compensate for differing switch deployment by CLECs in different areas. The profit potential in Connecticut may, for example, justify deploying a switch capable of more functions than in other, less densely populated markets (one CLEC has indicated its intention to deploy a switch capable of Class 3, 4 and 5 functions, thereby assuming the role of a tandem as well as an end office switch).[9]

**The State Policy Baselines**

Moreover, all of the States are starting from different regulatory policy overlays. This means each State, and indeed different companies within each State, may provide different services and service packages based upon different costing methodologies. Some of the service packages target low income and/or handicapped individuals and families.

The combination of these variables means that no uniform detailed pricing strategy can possibly make sense for all ILECs and CLECs in all areas of the country. If the FCC were to select one of the proffered models and attempt to make it the national model, it is likely that one or more types of companies would be systematically disadvantaged and/or that existing State pro-competitive regimes would be impeded. That is not what Congress intended.

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8 Network topology refers to the way the network is physically constructed (e.g. placement of central offices, tandem switching points, etc.), and the type of equipment installed, (e.g., fiber or copper, type/size of switch). Network topology is closely related to geographic and demographic characteristics. The amount of common costs as a proportion of total ILEC costs can vary dramatically by virtue of these factors.

9 Connecticut DPU Initial Comments at 11.

For example, on May 17, 1996, the Iowa Board issued a final decision and order in Docket No. RPU-95-10 setting the rate U S West must charge competitors for an unbundled loop. That rate was set based upon TSLRIC methodology, but the TSLRIC study used U S West's embedded investment and the depreciation rates set in U S West's last rate case. A ten percent markup to cover shared and common costs was allowed. This methodology produced a substantially lower loop cost than would have been the case if only forward-looking inputs had been used in the TSLRIC study. If the FCC adopts a rigid definition of TSLRIC in its interconnection rules and then requires States to apply the definition in pricing unbundled network elements, the reasonable loop pricing decision reached by the Iowa Board after a 10 month proceeding could be negated. The result could be a loop cost far above a fair calculation of what it costs U S West to provide the facility to its competitors.[10]

The Pennsylvania commission (PaPUC) has also moved forward and adopted forward looking economic costs as the basis for cost studies to promote competition. They have expended substantial resources to develop a consistent approach for the allocation of joint or common costs among competitive, noncompetitive, unbundled and universal service rates and rate elements. These efforts will be seriously jeopardized if the FCC proceeds to develop a national pricing standard to govern intrastate interconnection rates.

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[10] Uniform guidelines could also adversely impact similar efforts in New Hampshire. In Re New England Telephone & Telegraph Co., 76, NH PUC 150, 166-7, (1991) the NH PUC found that "basic exchange services are not only recovering their incremental cost, but are also contributing towards common overhead." The NH PUC did not accept cost studies suggesting basic local service is subsidized by toll. The PUC found the studies were misleading as they assigned NTS costs solely to local service and ordered a 25% reduction of NTS. The PUC did not apply any overall adjustment between incremental cost and the revenue requirement.

The PaPUC expects to have in place a final disposition of the appropriate cost and price standard for intrastate interconnection as a culmination of its two year long proceeding prior to the August 8, 1996 statutory deadline for a final Order in this docket. If the FCC mandates an intrastate interconnection cost standard that differs from the PaPUC disposition, that outcome would not only disrupt the PaPUC unbundling proceeding, it would also disrupt its pending competitive safeguards and universal service dockets as well.

Additional examples of potential disruptions are contained in the comments filed by many of NARUC's members in this proceeding.

**3 - The § 252 determination to leave pricing matters to the States recognizes that State adjudicative proceedings are better suited to address fact sensitive company specific cost/pricing issues in the context of that State's competitive and universal service policies.**

As suggested, supra, the 1996 Act's new framework reflects Congress' decision to leave direct oversight of intrastate markets, particularly with regard to pricing issues, to the States as the most efficient way to both assure the development of genuine local exchange competition and ensure consumers are protected.[11] That choice recognizes that cost models are extremely complex and fact sensitive undertakings.

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[11] For example, the Connecticut DPUC is currently examining pricing policies for access to E-911. E-911 is a matter of great interest to States and is almost by definition intrastate in nature. States may prefer various pricing methodologies for E-911 access that would be consistent with the 1996 Act, yet reflect varying policies for E-911. For example, one state may view a large markup above TSLRIC on E-911 as a method of ensuring the highest quality E-911 available; another jurisdiction may treat access to E-911 as a bottleneck facility that should command a particularly low markup. Regardless of the rationale chosen by the State, E-911 represents a particularly compelling argument for allowing States to retain control over pricing policies, including markup, and a clear example of an interconnection policy that Congress surely intended the FCC leave to the States. Connecticut DPUC Comments at 15.

The State ability to act in an adjudicative mode, with the related procedural sharpening of the record provided by the backdrop of a detailed factual base, the ability to cross-examine and exchange pointed discovery requests, is clearly better adapted to such inquiries. The FCC cannot reasonably perform this task in this short notice and comment period. Indeed, NARUC respectfully suggests the record derived thus far fails to provide an adequate foundation for the FCC to promulgate any pricing guidelines. As noted earlier, even if one concedes, arguendo, the FCC has the requisite authority, the diversity in approach and/or significant details found in the various commenter's proposals and the various current pro-competitive policies already being implemented by the States, suggests that promulgation of any such pricing guideline is, at best, premature.

## C. OTHER ISSUES:

### 1 - State certification requirements are not de facto barriers to entry.

At page 7 of their initial comments, the Consumer Federation of America suggests that State certification procedures are a barrier to entry.[12] The flaw in the CFA assertion is obvious. Nowhere in its comments do they give any specific example of how any individual State's requirements for certification actually "prohibit[s] or has the effect of prohibiting" entry.

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12 Specifically, on page 7 it states "[e]xclusive franchises, discriminatory fees, certification procedures, and economic privileges conferred upon the incumbent LEC by legislatures and regulators have rendered competition explicitly illegal in some cases or virtually impossible in others. As long as anticompetitive laws are on the books, competition will not become widespread because legal challenges will be a constant threat....In many states local telephone companies are protected by other statutes that create other barriers...like establishing certification requirements which make it difficult for entry to take place."

The FCC does not have <u>any</u> record evidence to support preemption of the certification requirements of even a <u>single</u> State, much less the broad-based preemption of certification requirements implied by the CFA comments.

Section 253 of the Act does, by its own terms, eliminate from any State Commission certification procedures express and related <u>de facto</u> exclusive franchising requirements, e.g., findings as to whether there is a public "demand" or "need" for a particular service. Congress has determined that that is no longer a fit subject for inquiry. The "risks" of entering a particular market are to be assessed by the entrant. However, <u>that is not to say States cannot maintain its certification procedures.</u> Section 253(b) expressly reserves State authority to impose "on a competitively neutral basis, and consistent with [§] 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of...services, and safeguard the rights of consumers." The ability through certification procedures, to keep track of new entrants is needed to permit effective enforcement of these service quality and consumer protection requirements. In other words, States must have some reasonable method of tracking utilities operating within their jurisdiction to be able to impose the rate and service quality regulation that even the FCC acknowledges States retain.[13]

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[13] Although AT&T ascribes a much broader scope to § 253 than the legislative history and statutory text warrant, even it acknowledges that § 253 was designed to "invalidate state franchising requirements and other laws that erect <u>legal</u> (not economic) barriers to entry." AT&T Comments at 5, note 4. This statement buttresses NARUC's original assertion in its initial comments that § 253 - in light of § 152(b), § 601, and related canons of statutory construction - must be construed narrowly to invalidate only exclusive franchising requirements or <u>de facto</u> exclusive requirements to provide a service or services, not the competitively neutral application of laws that merely increase the cost of entry. In the words of the statute, laws that "prohibit" or "have the effect of prohibiting" entry or the provision of service are preempted, not laws that merely increase the cost of providing the service.

Moreover, other aspects of State certification procedures frequently act to protect consumers from companies that are unable, for whatever reason, to deliver what they promise.[14]

**2. Any FCC arbitration guidelines should specify that those rules are meant for FCC use only and may not be used under any circumstances to require changes to State arbitration procedures that comply with the statute.**

Several commenters suggested the FCC provide guidelines to guide the States in their arbitration proceedings.[15] Under the time frame for arbitration provided in § 252(b)(1), arbitration requests will be filed beginning in the latter half of June 1996. FCC rules in this proceeding are not due until August 1996. Indeed, some States have already completed arbitrations of interconnection arrangements under their own rules and others will be significantly involved in additional proceedings before the FCC can provide guidance.

If Congress had intended for the FCC to provide guidance in this area, it is unlikely it would have designed a timeframe that allows arbitrations to begin before the deadline set for FCC action. Moreover, to the extent the FCC promulgates guidelines for its own use, it should specify that those rules are meant for its use only and may not be used under any circumstances to require changes to State arbitration procedures that comply with the more general restrictions imposed by the statute.

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14 Accordingly, inquiries to assure that a particular entrant has some reasonable financial backing and/or no past history of fraudulent activity is a consumer regulation not subject to the "entry" prohibition.

15 See, e.g., USTA's Initial Comments at 11

## III. CONCLUSION

NARUC looks forward to continued cooperative efforts to develop a national framework that genuinely opens the local market to competition. However, any final interconnection rules must provide sufficient flexibility to enable States to ensure a smooth transition to local competition and to protect against customer disruption and local rate increases. For the foregoing reasons, NARUC respectfully requests that the FCC incorporate the positions outlined, supra, in the final rule issued in this proceeding.

Respectfully submitted,

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**May 30, 1996**

## CERTIFICATE OF SERVICE

I, JAMES BRADFORD RAMSAY, certify that a copy of the foregoing was sent by first class United States mail, postage prepaid, to all parties on the attached Service List.

James Bradford Ramsay
Deputy Assistant General Counsel

National Association of
Regulatory Utility Commissioners

May 30, 1996